Statutory and Regulatory Provisions

As a result of several well-publicized hazardous waste disposal disasters in the 1970's, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1980. CERCLA, also known as Superfund, authorizes EPA to respond to environmental emergencies involving hazardous wastes or pollutants and contaminants, initiate investigations and cleanups, and take enforcement action against responsible parties. To provide money for these activities, CERCLA established a trust fund which is financed by taxes on the manufacture and import of chemicals and petroleum.

EPA's response authority may be exercised through removal actions or remedial actions. Removal actions are implemented when there is an immediate threat to human health and the environment. EPA has used removal actions to avert fires and explosions, prevent exposure to acute toxicity, and to protect drinking water supplies. Removal actions typically take less than twelve months to implement and cost less than two million dollars. Compared to removal actions, remedial actions may be longer-term and are usually more expensive cleanups.

CERCLA is designed to ensure that those who caused the pollution, rather than the general public, pay for the cleanup. In order to be held liable for the costs or performance of cleanup under CERCLA, a party must fall within one of the four categories found in CERCLA Section 107(a) and listed on the following page:

- Owner or operator of the facility at the time of disposal of hazardous substances;
- Current owner or operator of the facility;
- Person who generated or arranged for the disposal or treatment of hazardous substances; or
- Transporter of the hazardous substances, if this person selected the disposal or treatment site.

Using CERCLA, EPA has ensured the successful cleanup of many of the nation's worst hazardous waste sites. These cleanups have required the financing and participation of numerous Potentially Responsible Parties (PRPs). Many prospective purchasers, developers, and lenders have avoided getting involved with brownfield properties because they fear that they too might be held liable under CERCLA someday. As stated earlier, the vast majority of brownfield properties will never require EPA's attention under CERCLA or any other federal law. Accordingly, parties' fears of potential liability, rather than their actual incurrence of liability, are the primary obstacles to the redevelopment and reuse of brownfields. EPA hopes that the remaining sections of this handbook will assist in eliminating or reducing fears.

Because CERCLA is a statutory law enacted by Congress, it is binding in all legal actions brought under CERCLA, whether those actions are brought by EPA or in a private party lawsuit. Similarly, CERCLA regulations issued by EPA are binding in all CERCLA actions. As a result, CERCLA liability protections written into statute or regulation provide extremely valuable means for managing CERCLA liability risks.

CERCLA's Liability Scheme

Under CERCLA, liability for cleanup is strict, joint, and several, as well as retroactive. The implications of these features are as follows:

- Strict–A party can be held liable even if it did not act negligently or in bad faith.
- Joint and several-If two or more parties are responsible for the contamination at a site and unless a party can show that the injury or harm at the site is divisible, any one or more of the parties can be held liable for the entire cost of the cleanup.
- Retroactive-A party can be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Third-Party and Innocent Landowner Defenses

Description

CERCLA Section 107(b) establishes defenses to cleanup liability. One of these defenses, the "third-party" defense, may be useful in brownfields situations. In certain circumstances, a landowner is not liable under CERCLA for site contamination resulting from acts committed by a third party who is neither an employee nor an agent of the land-owner. In order for this defense to apply, the third party's act must not have occurred in connection with a direct or indirect contractual relationship with the land owner.

In 1986, Congress amended CERCLA Section 107(b) and 101(35), restricting the definition of "contractual relationship" to protect people who acquired real property after hazardous waste was disposed there and who "did not know and had no reason to know" that the property was contaminated. This is often referred to as the "innocent landowner defense" even though it is actually a version of the third-party defense.

To assert a third-party defense, an innocent landowner must show that he took adequate precautions against the third party's acts and that he exercised "due care" with regard to the hazardous substances involved. In other words, the landowner must show that he did not "invite" the third party's actions through negligence or make their consequences worse after they occurred. There are additional evaluation criteria for asserting the "innocent landowner" version of the third-party defense *(see box)*.

Other Considerations

It is fairly difficult for a landowner to establish that he did not know and had no reason to know that hazardous substances were present on his property. A landowner must establish that at the time of purchase he made "all appropriate inquiry" into the property's previous ownership and use. In assessing the inquiry's "appropriateness," the courts take into account any specialized knowledge or experience of the landowner, the relationship of the purchase

Evaluation Criteria

In addition to satisfying the "precautions" and "due care" requirements, one of the following must be demonstrated:

- The landowner did not know and had no reason to know that the property was contaminated with hazardous substances when he acquired it;
- The landowner is a governmental entity that acquired the property through involuntary transfer or eminent domain authority; or
- The landowner acquired the property by inheritance or will.

The "innocent landowner" defense CANNOT be asserted in any of the following circumstances:

- A landowner disposes of a hazardous substance on property that is already contaminated, even if he were unaware of the earlier contamination;

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Evaluation Criteria (continued)

- A landowner learns of contamination on their property and sells it without informing the purchaser; or
- A landowner contributes to a release of a hazardous substance on his property.

price to the property's value if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence of contamination, and the ability to detect such contamination by appropriate inspection.

If contaminants are subsequently found on the property, their very presence may cast doubt on the appropriateness of the inquiry. Landowners have not always succeeded in convincing courts that unsuccessful inquiries were "appropriate."

A party with an innocent landowner defense may request a *de minimis* landowner settlement with EPA (*see page 39).*

Secured Creditor Exemption

Description

CERCLA Section 101(20)(A) contains a secured creditor exemption which eliminates owner/operator liability for lenders who hold indicia of ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not participate in the management of the facility.

Before 1996, CERCLA did not define the key terms used in this provision. As a result, lenders often hesitated to loan money to owners and developers of contaminated property for fear of exposing themselves to potential CERCLA liability. In 1992, EPA issued the "CERCLA Lender Liability Rule" to clarify the secured creditor exemption. After the Rule was invalidated by a court in 1994, Congress incorporated many sections of the Rule into the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996. That Act amended CERCLA's secured creditor exemption to greatly clarify the situations in which lenders will and will not be protected from CERCLA liability. The amended exemption appears at CERCLA Section 101(20)(E)-(G).

"Participation in Management" Defined

A lender "participates in management" (and will not qualify for the exemption) if it:

- Exercises decision-making control over environmental compliance related to the facility, and in doing so, undertakes responsibility for hazardous substance handling or disposal practices; or
- Exercises control at a level similar to that of a manager of the facility, and in doing so, assumes or manifests responsibility with respect to

  (1) Day-to-day decision-making on environmental compliance, or

  (2) All, or substantially all, of the operational (as opposed to financial or administrative) functions of the facility other than environmental compliance.

The term "participate in management" does not include certain activities such as:

- Inspecting the facility;
- Requiring a response action or other lawful means to address a release or threatened release;
- Conducting a response action under CERCLA Section 107(d)(1) or under the direction of an on-scene coordinator;
- Providing financial or other advice in an effort to prevent or cure default; and
- Restructuring or renegotiating the terms of the security interest;

provided the actions do not rise to the level of participating in management.

After foreclosure, a lender who did not participate in management prior to foreclosure is not an "owner or operator" if it:

- Sells, releases (in the case of a lease finance transaction), or liquidates the facility.

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"Participation in Management" Defined (continued)

- Maintains business activities or winds up operations;
- Undertakes a response action under CERCLA Section 107(d)(1) or under the direction of an on-scene coordinator; or
- Takes any other measure to preserve, protect, or prepare the facility for sale or disposition;

provided the lender seeks to divest itself of the facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms. EPA considers this test to be met if the lender, within 12 months after foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

Other Considerations

The 1996 amendment also protects lenders from contribution actions and government enforcement actions. Regardless of CERCLA's secured creditor exemption from owner/operator liability, a lender may be liable under CERCLA as a generator or transporter if it meets the requirements outlined in CERCLA Section 107 (a)(3) or (4). In June 1997, EPA issued a lender policy which further clarifies the liability of lenders under CERCLA *(see page 31)*.

Limitation of Fiduciary Liability

Description

A "fiduciary" is a person who acts for the benefit of another party. Common examples include trustees, executors, and administrators. CERCLA Section 107(n), added by the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, protects fiduciaries from personal liability in certain situations, provides a liability limit for those fiduciaries who are found liable, and describes situations in which fiduciaries will and will not receive this statutory protection. CERCLA's fiduciary provision, however, does not protect the assets of the trust or estate administered by the fiduciary.

Fiduciary Liability:

For actions taken in a fiduciary capacity, liability under any CERCLA provision is limited to assets held in the fiduciary capacity. A fiduciary will not be liable in its personal capacity for certain actions such as:

- Undertaking or requiring another person to undertake any lawful means of addressing a hazardous substance;
- Enforcing environmental compliance terms of the fiduciary agreement; or
- Administering a facility that was contaminated before the fiduciary relationship began.

The liability limitation and "safe harbor" described above do not limit the liability of a fiduciary whose negligence causes or contributes to a release or threatened release.

The term "fiduciary" means a person acting for the benefit of another party as a bona fide trustee, executor, or administrator, among other things. It does not include a person who:

- Acts as a fiduciary with respect to a for-profit trust or other for-profit fiduciary estate, unless the trust or estate was created:
  - Because of the incapacity of a natural person, or
  - As part of, or to facilitate, an estate plan.
- Acquires ownership or control of a facility for the objective purpose of avoiding liability of that person or another person.

Nothing in the fiduciary subsection applies to a person who:

- Acting in a beneficiary or non-fiduciary capacity, directly or indirectly benefits from the trust or fiduciary relationship; or
- Is a beneficiary and fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits exceeding customary or reasonable compensation.

Protection of Government Entities That Acquire Property Involuntarily

Description

CERCLA Sections 101(20)(D) and 101(35)(A) protect federal, state, and local government entities from owner/operator liability if they involuntarily acquire contaminated property while performing their governmental duties. If a unit of state or local government makes an involuntary acquisition, it is exempt from owner/operator liability under CERCLA. Additionally, a state, local, or federal government entity that makes an involuntary acquisition will have a third-party defense to owner/operator liability under CERCLA if:

- The contamination occurred before the government entity acquired the property;
- The government entity exercised due care with respect to the contamination (*e.g.*, did not cause, contribute to, or exacerbate the contamination); and
- The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.

Regulations set forth at 40 CFR 300.1105, and validated by the 1996 Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, provide some examples of involuntary acquisitions.

As the examples below indicate, a government entity need not be completely passive in order to acquire property involuntarily. Often government entities must take some sort of discretionary, volitional action before they can acquire property following circumstances such as abandonment, bankruptcy, or tax delinquency. In these cases, the "involuntary" status of the acquisition is not jeopardized.

Other Considerations

A government entity will not have a CERCLA liability exemption or defense if it has

Acceptable Involuntary Acquisitions

EPA considers an acquisition to be "involuntary" if the government's interest in, and ultimate ownership of, the property exists only because the conduct of a non-governmental party gives rise to the government's legal right to control or take title to the property.

Involuntary acquisitions by government entities include the following:

- Acquisitions made by a government entity functioning as a sovereign (such as acquisitions following abandonment or tax delinquency);
- Acquisitions made by a government entity acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority (such as acquisitions of the security interests or properties of failed private lending or depository institutions);
- Acquisitions by a government entity through foreclosure and its equivalents while administering a governmental loan, loan guarantee, or loan insurance program; and
- Acquisitions by a government entity pursuant to seizure or forfeiture authority.

caused or contributed to the release or threatened release of contamination. As a result, acquiring property involuntarily does not unconditionally or permanently insulate a government entity from CERCLA liability. Furthermore, the liability exemption and defense described above do not shield government entities from liability as generators or transporters of hazardous substances under CERCLA Section 107(a)(3) or (4).

In June 1997, EPA issued a policy which further clarifies the CERCLA liability of government entities that involuntarily acquire property *(see page 31)*.

De Minimis Waste Contributor Settlements

Description

At a CERCLA site, some parties may have contributed only minimal amounts of hazardous substances compared to the amounts contributed by other parties. Under CERCLA Section 122(g), these contributors of small amounts may enter into *de minimis* waste contributor settlements with EPA. Such a settlement provides the waste contributor with a covenant not to sue and contribution protection from the United States. As a result, the settling party is protected from legal actions brought by EPA or other parties at the site. In exchange for the settlement, the *de minimis* party agrees to provide funds, based on its share of total waste contribution, toward cleanup, or to undertake some of the actual work.

EPA Policies and Guidance

Issuing a policy or guidance document is the strongest statement that EPA can make, short of issuing regulations, regarding the circumstances in which EPA may bring a CERCLA enforcement action against a particular type of party. Although the courts are not bound by EPA's administrative policies or guidance documents, they have recognized EPA's technical expertise and have generally ruled in agreement with EPA's opinions and interpretations of the laws it implements.

When a site, circumstance, or party falls within the defined criteria of an EPA policy or guidance document, individuals should find satisfaction in the fact that EPA will act in a manner consistent with that policy. In many cases, EPA's statement of policy not to pursue a particular type of party will provide adequate protection and comfort to an eligible party who will not need to seek additional documentation from EPA. In other cases, the potential for liability may motivate a party either to enter into an agreement with EPA that provides protection from CERCLA actions brought by EPA or other parties, or to seek written comfort from EPA.

The policy and guidance documents summarized in this section describe all three of these avenues for managing CERCLA liability risks. Because the documents focus on issues at non-federally-owned properties, parties interested in property currently or formerly owned by the federal government should consult the relevant documents listed in Appendix A.

Policy Towards Owners of Residential Property at Superfund Sites

Description

July 3, 1991

Owners of residential property located on a CERCLA site have raised concerns that they would be responsible for performance of a response action or payment of cleanup costs because they came within the definition of "owner" under CERCLA. Additionally, the owners were concerned that they might be unable to sell their properties given the uncertainty of EPA taking action against them. EPA issued its policy toward residential property owners to clarify when it would not require these owners to perform or pay for cleanup. The policy states that EPA, in the exercise of its enforcement discretion, will not take enforcement actions against an owner of residential property unless his activities lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site.

In addition to applying to owners, EPA's policy applies to lessees of residential property whose activities are consistent with the policy. The policy also applies to persons who acquire residential property through purchase, foreclosure, gift, inheritance or other form of acquisition, as long as those persons' activities after acquisition are consistent with the policy.

Other Considerations:

With respect to EPA's exercise of enforcement discretion under this policy, it is irrelevant whether an owner of residential property has or had knowledge or reason to believe that contamination was present on the site at the time of purchase or sale of the residential property.

Threshold Criteria

An owner of residential property located on a CERCLA site is protected if the owner:

- Has not and does not engage in activities that lead to a release or threat of release of hazardous substances, resulting in the taking of a response action at the site;
- Cooperates fully with EPA by providing access and information when requested and does not interfere with the activities either EPA or a state are taking to implement a CERCLA response action;
- Does not improve the property in a manner inconsistent with residential use; and
- Complies with institutional controls (*e.g.*, property use restrictions) that may be placed on the residential property as part of the Agency's response action.

For further information contact:
Lori Boughton - (202) 564-5106
The Office of Site Remediation Enforcement

Policy Towards Owners of Property Containing Contaminated Aquifers

Description

July 3, 1995

The contaminated aquifer policy addresses the CERCLA liability of owners of property that contain an aquifer contaminated by a source or sources outside their property. These owners were concerned that EPA would hold them responsible for cleanup under CERCLA even though they did not cause and could not have prevented the groundwater contamination.

The policy states that EPA, in an exercise of its enforcement discretion, will not take an action under CERCLA to require cleanup or the payment of cleanup costs provided that the landowner did not cause or contribute to the contamination.

Threshold Criteria:

A landowner is protected by this policy if *all* of the following criteria are met:

- The hazardous substances contained in the aquifer are present solely as the result of subsurface migration from a source or sources outside the landowner's property;
- The landowner did not cause, contribute to, or make the contamination worse through any act or omission on their part;
- The person responsible for contaminating the aquifer is not an agent or employee of the landowner, and was not in a direct or indirect contractual relationship with the landowner (exclusive of conveyance of title); and
- The landowner is not considered a liable party under CERCLA for any other reason such as contributing to the contamination as a generator or transporter.

This policy may not apply in cases where:

- The property contains a groundwater well which may influence the migration of contamination in the affected aquifer*;* or
- The landowner acquires the property, directly or indirectly, from a person who caused the original release.

Other Considerations

If a third party who caused or contributed to the contamination sues or threatens to sue, EPA may consider entering into a *de minimis* landowner settlement with parties protected by this policy *(see page 39).*

For further information contact:

Elisabeth Freed - (202) 564-5117

The Office of Site Remediation Enforcement

Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities

Description

June 30, 1997

The lender liability policy clarifies the circumstances in which EPA intends to apply as guidance the provisions of the 1992 CERCLA Lender Liability Rule ("Rule") and its preamble in interpreting CERCLA's lender and involuntary acquisition provisions. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended these CERCLA provisions and generally followed the approach of the Rule. EPA's subsequent lender policy explains that when interpreting the amended secured creditor exemption, EPA will treat the Rule and its preamble as authoritative guidance. For example, the amendments do not clarify the steps that a lender can take after foreclosure and still remain exempt

Example:

After foreclosure, a lender who did not "participate in management" prior to foreclosure can generally:

- Maintain business activities;
- Wind up operations; and
- Take actions to preserve, protect, or prepare the property for sale

provided that the lender attempts to sell, re-lease property held pursuant to a lease financing transaction, or otherwise divest itself of the property in a reasonably expeditious manner using commercially reasonable means. This test will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.

from owner/operator liability. In making liability determinations, EPA, following its policy, will defer to the Rule (*see box*).

The 1996 amendment also validates the portion of the Rule that addresses involuntary acquisitions by government entities. EPA's policy clarifies that similar to the preamble of any valid regulation, the preamble to the CERCLA Lender Liability Rule will be looked to as authoritative guidance on the meaning of the portion of the Rule addressing involuntary acquisitions.

For further information contact:

Lori Boughton - (202) 564-5106

The Office of Site Remediation Enforcement

Guidance on Settlements With Prospective Purchasers of Contaminated Property

Description

May 1995

Knowledge of contamination prior to purchase prevents a party from asserting the CERCLA "innocent landowner defense" after acquisition of a property. As a result, many prospective purchasers have avoided buying properties that are contaminated or merely perceived to be contaminated. To solve this problem at contaminated properties where EPA action has been, is currently, or may be taken, the agency may enter into administrative agreements with prospective purchasers who agree to provide a benefit to EPA. In return, the agreement provides a promise or covenant from the federal government not to sue the prospective purchaser for the costs of cleaning up the contamination that existed at the time of purchase.

Criteria

EPA may enter into a prospective purchaser agreement in situations where all of the following criteria can be met:

- EPA has undertaken, is undertaking, or plans to undertake, a response action;
- The agreement will result in either:
  - a substantial direct benefit to EPA in terms of cleanup or funds for cleanup; or
  - a lesser direct benefit to EPA coupled with a substantial indirect benefit to the community (such as the creation of jobs, preservation of green space, or infrastructure development);
- With the exercise of due care, the continued operation of the facility or new site development will not aggravate or contribute to the existing contamination or interfere with EPA's response action;
- The continued operation or new development of the property will not pose health risks to the community and those persons likely to be present at the site; and
- The prospective purchaser is financially viable.

Other Considerations

Prospective purchaser agreements may not be appropriate at sites where there are other means available to address CERCLA liability concerns (e.g., private mechanisms such as insurance or indemnification agreements) without EPA involvement, and at sites undergoing cleanup through a state program.

This guidance also applies to persons seeking prospectively to operate or lease contaminated property.

The model prospective purchaser agreement used by the agency can be found in Appendix C.

For further information contact:

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Helen Keplinger (202) 564-4221
The Office of Site Remediation Enforcement

Policy on the Issuance of EPA Comfort/Status Letters

Description

November 12, 1996

Some properties may remain unused or underutilized because potential property owners, developers, and lenders are unsure of the environmental status of these properties. By issuing comfort letters, EPA helps interested parties better understand the likelihood of EPA involvement at a potentially contaminated property. Although not intending to become involved in typical private real estate transactions, EPA is willing to provide a comfort letter when appropriate.

Comfort letters are intended to clarify the likelihood of EPA involvement at a site, or identify whether a party is protected by a statutory provision or discretionary enforcement policy. If EPA is not involved at the property, the party may be referred to the appropriate state agency for further

Evaluation Criteria

EPA may issue a comfort letter upon request if:

- The letter may facilitate cleanup and redevelopment of potentially contaminated property;
- There is the realistic perception or probability of incurring CERCLA liability; or
- There is no other mechanism available to adequately address the party's concerns.

information. EPA does not intend to become involved in typical private real estate transactions.

Comfort letters address a particular set of circumstances and provide whatever information is contained within EPA's databases. Questions typically addressed by comfort letters include:

- Is the site or property listed in CERCLIS?
- Has the site been archived from CERCLIS?
- Is the site or property contained within the defined boundaries of a CERCLIS site?
- Has the site or property been addressed by EPA and deleted from the defined site boundary?
- Is the site or property being addressed by a state voluntary cleanup program?
- Is EPA planning or currently performing a response action at the site?
- Are the conditions at the site or activities of the party addressed by a statutory provision or EPA policy?
- Is the site in CERCLIS but designated as a state-lead or deferred to the state agency for cleanup?

The agency uses four **sample** comfort letters to respond to requests. The samples can be found in Appendix D.

For further information contact:

Elisabeth Freed - (202) 564-5117

The Office of Site Remediation Enforcement

Interim Approaches for Regional Relations with State Voluntary Cleanup Programs

Description

November 14, 1996

State and local empowerment to clean up sites is at the center of EPA's Brownfields Initiative. Many states have developed voluntary cleanup programs that are designed to streamline protective cleanups of sites that are not on the National Priorities List and other sites not of federal interest.

EPA regional offices have developed partnerships with states with voluntary cleanup programs through the negotiation of Memoranda of Agreement (MOA). During the negotiation of an agreement, EPA and the interested state address state capabilities, programmatic areas, and the types of sites to be included.

EPA's guidance is intended to facilitate regional/state MOA negotiations. The MOA delineates the roles and responsibilities between a state and EPA with respect to sites being cleaned up under the state's voluntary cleanup programs. This interim guidance sets out six baseline criteria which are evaluated before a region enters into an MOA with a state voluntary cleanup

program. Through the signed and completed MOA, EPA acknowledges the adequacy of the state voluntary cleanup program. EPA also agrees that for sites addressed under the MOA, EPA does not plan or anticipate taking a removal or remedial action at sites involved in the voluntary cleanup program, unless EPA determines that there may be an imminent and substantial danger to public health or welfare or the environment.

Program Evaluation Criteria

EPA may enter into an MOA addressing a state voluntary cleanup program that meets all of the following baseline criteria:

- Provides opportunities for meaningful community involvement.
- Ensures that voluntary *response actions* are protective of human health and the environment.
- Has adequate resources to ensure that voluntary *response actions* are conducted in an appropriate and timely manner, and that both technical assistance and streamlined procedures where appropriate, are available from the State agency responsible for the Voluntary Cleanup Program.
- Provides mechanisms for the written approval of *response action* plans and a certification or similar documentation indicating that the response actions are complete.
- Provides adequate oversight to ensure that voluntary *response actions* are conducted in such a manner to assure protection of human health and the environment, as described above.
- Shows the capability, through enforcement or other authorities, of ensuring completion of *response actions* if the volunteering party (ies) conduction the response action fail(s) or refuse(s) to complete the necessary response action, including operation and maintenance or long-term monitoring activities if appropriate.

For further information contact:

Leslie Jones - (202) 564-5123.
The Office of Site Remediation Enforcement

Nancy Wilson - (202) 260-1910.
Outreach and Special Project Staff

Guidance on Landowner Liability Section 107(a)(1) of CERCLA, *de minimis* Landowner Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property

Description

June 16, 1989

In the event of a release or threatened release of a hazardous substance, owners of property where such a substance has been "deposited, stored, disposed of, or placed, or otherwise come to be located" are liable for the costs of cleaning up the release. Under Section 107(b)(3), liability extends to releases caused by a third party "in connection with a contractual relationship, existing directly or indirectly" with the owner. To address concerns that liability could be unfairly assigned to landowners who had not been involved in hazardous substance disposal activities, EPA issued its policy on de minimis landowner

settlements. (This policy also includes a section on settlements with prospective purchasers that was superseded by the May 1995 *Guidance on Settlements with Prospective Purchasers of Contaminated Property*). The policy states that the Agency will make an effort to determine in the early stages of a case whether a landowner satisfies the elements (see box) necessary to establish a third party defense under Section 107(b)(3) of CERCLA. If the Agency determines the landowner meets the elements, the Agency may negotiate a *de minimis* settlement under Section 122(g)(1)(B) of CERCLA. The settlement provides the landowner with a covenant or promise that EPA will not sue the landowner for the costs of cleaning up existing contamination, as well a protection from contribution actions brought by other parties. In exchange, EPA may require the landowner to provide, at a minimum, access and cooperate with any cleanup activities on their property.

Elements of Defense

1. Did the landowner acquire the property without knowledge or reason to know of the disposal of hazardous substances?
2. Did governmental landowners acquire the property involuntarily or through eminent domain proceedings?
3. Did the landowner acquire the property by inheritance or bequest without knowledge?
4. Was the property contaminated by third parties outside the chain of title?

Other Considerations:

EPA may consider entering into de minimis landowner settlements with parties protected by the *Policy Towards Owners of Property Containing Contaminated Aquifers*.

For further information contact:

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(202) 564-4221
Office of Site Remediation Enforcement

Revised Guidance on CERCLA Settlements with De Micromis Waste Contributors

Description

June 3, 1996

EPA provides enhanced protection for a subset of *de minimis* waste contributors referred to as "de micromis". De micromis settlements may be available to parties who generated or transported a minuscule amount of waste to a Superfund site, an amount less than the minimal amount normally contributed by the *de minimis* parties. EPA's revised guidance defines eligible de micromis parties with volumetric cut-offs (*see box*). As a matter of policy, EPA does not pursue de micromis waste contributors for the costs of cleaning up a site. If, however, a de micromis party is threatened with litigation by other parties at the site for the costs of cleanup, EPA will enter into a zero dollar settlement with the de micromis party. De micromis settlements provide both a covenant not to sue from the Agency and contribution protection against other parties at the site.

Eligibility for a de micromis settlement

EPA's policy is to not pursue a party if their waste contribution at a site is:

- Equal or less than either (1) 0.002% of the total hazardous waste volume, or (2) 110 gallons (e.g., two 55 gallon drums) or 200 pounds of material containing hazardous substances; or
- 0.2% of total volume where the party contributed only municipal solid waste.

For further information contact:

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Office of Site Remediation Enforcement